

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

XL SPECIALTY INSURANCE COMPANY,

Plaintiff,

v.

SILVER BAY LOGGING, INC.,

Defendant.

CASE NO. C06-881RSM

ORDER ON MOTION FOR PARTIAL
SUMMARY JUDGMENT

SILVER BAY LOGGING, INC.,

Counterclaimant,

v.

XL SPECIALTY INSURANCE COMPANY,

Counterdefendant.

This matter is now before the Court for consideration of plaintiff's motion for partial summary judgment. Dkt. # 37. Plaintiff asks that two of defendant's affirmative defenses, as well as counterclaims arising from plaintiff's alleged failure to inspect the vessel at issue, be dismissed. Defendant has opposed the motion. The Court has considered the motion, responsive memorandum, and supporting declarations. For the reasons set forth below, the motion shall be granted.

FACTUAL BACKGROUND

This action arises from damage that occurred in January, 2006, to defendant's barge TC-244 while it was under tow from Wrangell, Alaska, to Port Townsend, Washington, with a load of wood

1 chips. The barge progressively listed to starboard during the voyage, to the point where the starboard
2 side bin wall collapsed, causing damage to the barge and partial loss of cargo. Plaintiff, an insurer of the
3 barge under a marine hull and machinery coverage policy, filed this action seeking a declaration
4 that the insurance policy issued to defendant is void and provides no coverage for the loss. Dkt. # 1.
5 Plaintiff asserts in the complaint that repairs made to the barge following an earlier (2004) incident¹ were
6 inadequate, and as a result the barge was not seaworthy at the inception of the 2005-2006 voyage. *Id.*
7 Plaintiff further alleges that defendant failed to disclose the unseaworthy condition, resulting in the
8 voiding of the policy of insurance. *Id.*

9 After discovery commenced, plaintiff obtained leave to amend the complaint. The amended
10 complaint clarifies certain dates and particulars of the tow incident, and adds an allegation that defendant
11 knew or should have known that the barge was unfit for her intended service. Dkt. # 31. In answering
12 the amended complaint, defendant asserts the affirmative defense of estoppel, contending that plaintiff “is
13 estopped by its words and actions from relying upon any alleged violation of any implied or expressed
14 warranties of seaworthiness pertaining to the policies of insurance issued by the plaintiff. . .” Dkt. # 33,
15 p. 3. Defendant asserted as a separate affirmative defense the contention that as a result of the 2004
16 incident, “plaintiff was aware of the condition of the barge and the means by which it was to be repaired
17 at the time of renewal of its insurance coverage for the barge.” *Id.* These are designated as affirmative
18 defenses # 2 and # 3 in the answer.

19 Defendant also asserts counterclaims against plaintiff, alleging that plaintiff “was aware of the
20 location, manner, and means of the repairs performed upon the Barge to repair the damage caused by the
21 first incident”, and that “[u]pon completion of the repairs to the Barge after the first incident defendant
22 requested that plaintiff have its marine surveyor inspect the repairs, but plaintiff refused to do so.” *Id.*, p.
23 4. Plaintiff’s motion for partial summary judgment addresses these two affirmative defenses, as well as
24 the counterclaims, “to the extent they allege that an insurer is required to inspect a vessel when asked to
25 do so by an insured.” Motion for Partial Summary Judgment, Dkt. # 37, pp. 1-2.

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27 ¹Plaintiff was also the insurer of the barge during the earlier incident, and covered the loss under
28 the policy in effect at that time. The barge was repaired, and the insurance policy was renewed and in
force from December 5, 2005 through December 5, 2006.

DISCUSSION

Summary judgment is proper only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." F.R.Civ. P. 56(c). The moving party has the burden of demonstrating the absence of a genuine issue of fact for trial by "identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotrex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party satisfies this burden, the opponent must set forth specific facts showing that there remains a genuine issue for trial. F.R.Civ. P. 56(e).

A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). If the evidence is merely colorable or is not significantly probative, summary judgment may not be granted. *Id.* at 249-50. It is not the court's function at the summary judgment stage to determine credibility or to decide the truth of the matter. *Id.* Rather, "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255.

Plaintiff contends that the two affirmative defenses above, as well as all counterclaim allegations that the insurer had a duty to inspect the barge, should be dismissed as they lack any basis in law. Plaintiff asserts that under applicable maritime law, the insured had a duty to disclose all relevant facts and conditions that may bear upon the insurability of the barge, while the insurer had no duty to inspect the barge or investigate its condition prior to issuing the policy. This assertion is based upon the law of *uberrimae fidei*, or utmost good faith. A marine insurance contract is said to be a contract *uberrimae fidei*. *McLanahan v. Universal Ins. Co.*, 26 U.S. (1 Pet.) 170 (1828). According to this doctrine, an underwriter is presumed to act on the belief that the party who has applied for insurance has disclosed all facts material to the risk. If an applicant fails to reveal material facts presumed by the applicant or presumed to be known, the insurer may void the contract *ab initio*, or from the beginning. Material facts are those that may have a bearing on whether the insurer would accept the risk or the premium or terms

1 under which the risk would be insured. *Gulfstream Cargo Ltd. v. Reliance Ins. Co.*, 409 F.2d 974 (5th
2 Cir. 1969). The doctrine of *uberrimae fidei* requires a marine insurance applicant “even if not asked, to
3 reveal every fact within his/her knowledge that is material to the risk.” *Certain Underwriters at Lloyd’s*
4 *v. Montford*, 52 F.3d 219, 222 (9th Cir. 1995) (quoting *Washington Int’l Ins. Co. v. Mellone*, 773 F.
5 Supp. 189, 191 (C.D. Cal. 1990)) (emphasis added).

6 Plaintiff asserts that defendants’ affirmative defenses and counterclaims are based upon the
7 assumption that the insurer has a corresponding duty to inspect the vessel to be insured, yet no such legal
8 duty exists. In opposition to this assertion, defendant has argued facts which go to the merits of
9 plaintiff’s claims, not the arguments advanced by plaintiff in support of partial summary judgment.
10 Defendant contends that the doctrine of *uberrimae fidei* imposes an equal duty upon the insurer to deal
11 fairly with the insured, citing *Contractors Realty Co. v. Insurance Company of North America*, 469 F.
12 Supp. 1287, 1294 (S.D.N.Y. 1979). However, nowhere has defendant provided legal authority to refute
13 plaintiff’s assertion regarding the insurer’s duty to inspect, or rather, the lack of such duty.

14 In light of defendant’s failure to provide legal authority to rebut plaintiff’s assertion that the
15 insurer has no duty to inspect, the Court finds that defendant’s two affirmative defenses challenged in this
16 motion lack an arguable legal basis, and they shall be dismissed on summary judgment. As to the
17 counterclaims, however, the Court finds that defendant has simply made factual allegations regarding
18 plaintiff’s knowledge of the repairs, and failure to inspect the barge following repair of damage from the
19 first incident, without asserting any accompanying duty or breach of duty arising from that failure. These
20 are factual assertions which may be disputed by plaintiff, but as defendant has attached no legal
21 consequence to them, the factual assertions are not subject to dismissal at this time. The only actual legal
22 claim regarding the subject matter of this lawsuit asserted in the counterclaims is that in failing to conduct
23 “a reasonable investigation in response to defendant’s claim for coverage from the **second** incident,”
24 plaintiff has “acted negligently, has not acted in good faith, and has otherwise breached its duties to
25 defendant. . . .” Answer to Amended Complaint, Dkt. # 33, Counterclaim ¶ 10 (emphasis added).² This

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27 ²Defendant also states in ¶ 6 of the counterclaims that plaintiff

28 failed to conduct a reasonable investigation of the first incident, acted negligently,

1 counterclaim goes to the ultimate legal issue in this case, which is plaintiff's denial of coverage after the
 2 incident, and the bases therefore. It does not assert as its legal basis any duty of the insurer to inspect the
 3 repairs prior to providing insurance coverage. It is therefore not subject to dismissal on the basis asserted
 4 in this motion.

5 CONCLUSION

6 Accordingly, plaintiff's motion for partial summary judgment is GRANTED as to affirmative
 7 defenses ## 2 and 3, and these affirmative defenses are DISMISSED. The motion for partial summary
 8 judgment is DENIED as to the allegations set forth in the counterclaims.

9 Dated this 4 day of March, 2008.



11 RICARDO S. MARTINEZ
 12 UNITED STATES DISTRICT JUDGE

21 unreasonably delayed in the adjustment of the claim from the first incident, acted in
 22 bad faith, and breached its duties to defendant under RCW 48.01.030, WAC 284-30,
 23 AS Chapter 21.36 and 3 AAC Chapter 26 and the common law **with respect to its**
 24 **response to defendant's claim and payment for the first incident.** As a result of
 25 plaintiff's negligence and failure to timely perform its duties to defendant with respect
 to the first incident, the defendant suffered loss of income and other damages, and was
 delayed in the commencement and completion of the damage repairs to the Barge
 resulting from the first incident.

26 Dkt. # 33, p. 4 (emphasis added). It is not clear whether by this statement defendant means to
 27 assert a claim for damages resulting from the first incident, or simply recites these allegations as part of
 28 the relevant history. In either case, however, this statement cannot be read as asserting a counterclaim
 arising from an alleged duty to inspect the repairs prior to providing coverage.